No. 01-283

In the Supreme Court of the United States

STATE OF UTAH, ET AL., APPELLANTS

v.

DONALD L. EVANS, SECRETARY OF COMMERCE, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

MOTION TO DISMISS OR AFFIRM

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QUESTIONS PRESENTED

In the 2000 census, the Census Bureau included federal employees living outside the United States in the official state-level population totals, but the Bureau determined not to include other United States nationals residing abroad. The questions presented are as follows:

1. Whether the Bureau's decision not to include in the official state-level population figures missionaries of the Church of Jesus Christ of Latter-day Saints residing abroad violated the Census Clause (Article I, Section 2, Clause 3) of the Constitution or the Census Act, 13 U.S.C. 1 *et seq.*

2. Whether the Bureau's decision violated the Free Exercise Clause of the First Amendment or the Religious Freedom Restoration Act of 1993, 42 U.S.C. 2000bb *et seq.*

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MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 18.6 of the Rules of this Court, the Solicitor General, on behalf of the Secretary of Commerce and the Director of the Bureau of the Census, respectfully moves that this appeal be dismissed or, alternatively, that the judgment of the district court be affirmed.

OPINION BELOW

The opinion of the three-judge district court (J.S. App. 1a-20a) is reported at 143 F. Supp. 2d 1290.

JURISDICTION

The judgment of the district court was entered on April 18, 2001. The notice of appeal (J.S. App. 21a-22a) was filed on June 15, 2001. The jurisdictional statement was filed on August 14, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1253.

STATEMENT

1. The Constitution requires a decennial census for the purpose of determining the number of Representatives to which each State is entitled. Article I, Section 2, Clause 3 provides that "Representatives * * * shall be apportioned among the several States * * * according to their respective Numbers" (the Apportionment Clause). It also directs that "[t]he actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten Years, in such Manner as they shall by Law direct" (the Census Clause). *Ibid.* In addition, Section 2 of the Fourteenth Amendment provides that "Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed."

2. The Census Act, 13 U.S.C. 1 *et seq.*, states that the Secretary of Commerce "shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year, which date shall be known as the 'decennial census date', in such form and content as he may determine." 13 U.S.C. 141(a). The Bureau of the Census and its Director assist the Secretary in the performance of his duties under the Census Act. See 13 U.S.C. 2, 21. The "tabulation of total population by States" for the purpose of apportionment of Representatives among the States is to be completed and reported by the Secretary to the President within nine months after the April 1 "census date." 13 U.S.C. 141(b). Within one week after the beginning of the first session of Congress following the census, the President must transmit to Congress a statement showing the "whole number of persons in

each State * * * and the number of Representatives to which each State would be entitled" under the statutorily prescribed "equal proportions" formula for apportioning Representatives. 2 U.S.C. 2a(a); see *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 451-455 (1992). "Each State shall be entitled * * * to the number of Representatives shown in the statement" submitted by the President. 2 U.S.C. 2a(b). Within 15 days after receiving that statement, the Clerk of the House of Representatives must "send to the executive of each State a certificate of the number of Representatives to which such State is entitled." *Ibid.*

3. Among the many issues to be considered in conducting the decennial census is whether, and, if so, how, to allocate United States nationals who are residing outside the United States on the census date to particular States for purposes of the apportionment of Representatives among the States. From 1790 through 1890, the only overseas counts took place in connection with the 1830 and 1840 censuses, which resulted in the publication of separate population counts of "crews of naval vessels at sea." 1 A.R. 202. The naval personnel included in those counts were not allocated to any State and were not included in the population for purposes of apportioning Representatives. *Ibid.*

In 1900, the government conducted a separate enumeration of federal military and civilian personnel and their dependents stationed abroad. 1 A.R. 203. Although persons identified in that count were not allocated to particular States, stateside enumerators were instructed that any federal military or civilian employee stationed abroad who was a member of a family living in the United States "should be enumerated as a member of that family, even though he may be absent on

duty at the time of the enumeration." *Ibid.* That instruction was changed in the 1910 and subsequent censuses, however, when enumerators were specifically told that federal military and civilian personnel stationed abroad should *not* be counted as members of stateside families. See, *e.g.*, *id.* at 218. Although the government conducted counts of overseas military and federal civilian employees in several later censuses, the federal personnel included in those counts were not allocated to particular States for purposes of the apportionment of Representatives among the States until the 1970 census. See *Franklin* v. *Massachusetts*, 505 U.S. 788, 792-793 (1992). In conducting the 1970 census, the Census Bureau also made a concerted effort to count private United States citizens living abroad. The counts of private individuals, however, were not used for purposes of apportionment, see 1 A.R. 29-37, 680-681, 768-769; 2 A.R. 1016-1019, in light of concerns about their accuracy. For example, the Census Bureau estimated that the underenumeration of private United States citizens living in Mexico and Canada probably exceeded 90 percent. See 1 A.R. 39-40, 680; 2 A.R. 1016-1017.

The Census Bureau "did not allocate overseas employees to particular States in the 1980 census." *Franklin*, 505 U.S. at 793. Although the Bureau initially "took the position that overseas federal employees would not be included in the 1990 state enumerations either," several bills were introduced in Congress that would have required the inclusion of overseas military personnel for apportionment purposes. *Ibid.* In July 1989, then-Secretary of Commerce Robert Mosbacher decided to allocate overseas federal military and civilian personnel to their home States for purposes of congressional apportionment. *Ibid.* This Court sustained the

constitutionality of that decision, see *id.* at 803-806, finding that the Secretary's approach was "consonant with, though not dictated by, the text and history of the Constitution," *id.* at 806. The Court further observed that "[t]he Secretary's judgment does not hamper the underlying constitutional goal of equal representation, but, assuming that employees temporarily stationed abroad have indeed retained their ties to their home States, actually promotes equality." *Ibid.*

Prior to the 2000 census, the Bureau established the Census 2000 Contingency Committee on Americans Abroad and conducted an extensive study of the feasibility of counting private citizens living abroad. See J.S. App. 6a n.1. The Committee's report identified a number of difficult issues bearing on whether and how to count Americans overseas, including: (1) Who should be counted? For example, would the enumeration include only U.S. citizens? Only those citizens who can provide a home of record? Only citizens who intend to return to the United States? How should dual citizens be handled, or non-citizen spouses of Americans? (2) How would home states be determined? (3) How would the Census Bureau verify the citizenship and home state information? (4) How would the Census Bureau treat private American citizens living in a U.S. Commonwealth or Territory? (5) How would the Census Bureau obtain contact information for these individuals and actually contact them? (6) How would the Bureau prevent double counting? (7) How would the Bureau pay for such a costly enterprise? See 1 A.R. 650-652; see also 1 A.R. 768-776; 2 A.R. 1159-1161. The Bureau was also concerned that any such count could expose Census 2000 to legal challenges, because incomplete and inaccurate results could skew the apportionment figures. See 1 A.R. 644-645, 678, 772; 2 A.R. 1038.

> The Committee ultimately concluded that
>
> any attempt to enumerate private U.S. citizens abroad in Census 2000 would be a daunting undertaking for very little return. * * * Previous attempts to take a census of Americans overseas have failed, and it is certain that any such effort in the next census would result in data that would be incomplete and of questionable quality.

1 A.R. 649. Accordingly, the Bureau decided to adopt the same approach for the 2000 census that it had utilized in 1990—namely, counting federal military and civilian personnel stationed abroad and their dependents, but not private individuals residing abroad. See J.S. App. 6a & n.1.

As early as 1996, the Census Bureau informed Congress of its intention to count federal personnel stationed overseas and their dependents, but not other United States nationals residing abroad, in the 2000 census. 1 A.R. 559-566. Congress considered, but ultimately did not enact, a bill that would have required the Bureau to count non-federal employees living overseas. See 2 A.R. 1013-1026 (discussing S. 2260, 105th Cong., 2d Sess. (1998)); see also 2 A.R. 1284-1285 (discussing two proposed concurrent resolutions expressing the "sense of Congress" that "all citizens of the United States residing overseas" should be enumerated in the 2000 census). The Census Bureau recommended against enactment of the proposed legislation, expressing the view that "it is neither feasible nor practical to enumerate and allocate to a respective population of the several States all American citizens living abroad as would be required by S. 2260." 2 A.R. 1013. Several months after the year 2000 census date, the Conference Committee on the appropriations bill for the Census

Bureau for fiscal year 2001 requested that the Secretary of Commerce "submit to the Congress, no later than September 30, 2001, a written report on any methodological, logistical, and other issues associated with the inclusion in future decennial censuses of American citizens and their dependents living abroad, for apportionment, redistricting, and other purposes for which decennial census results are used." H.R. Conf. Rep. No. 1005, 106th Cong., 2d Sess. 256-257 (2000). In response to that request, the Census Bureau recently submitted its report, dated September 27, 2001, to the Subcommittee on Commerce, Justice, State, the Judiciary and Related Agencies of the House Committee on Appropriations.

4. On January 10, 2001, appellants—the State of Utah, various state and federal officials from Utah, and four citizens of Utah who were residing abroad as missionaries for the Church of Jesus Christ of Latter-day Saints (LDS) during the 2000 census—commenced this action for declaratory and injunctive relief against the Secretary of Commerce and the Director of the Census Bureau. Appellants alleged that by including federal employees residing abroad in the official state-level population totals while declining to count overseas LDS missionaries, the Secretary and the Director had violated the Census Clause, U.S. Const. Art. I, § 2, Cl. 3; the First Amendment; the Equal Protection Clause of the Fifth Amendment; the Fourteenth Amendment; the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*; the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.*; the Census Act, 13 U.S.C. 1 *et seq.*; and 2 U.S.C. 2a. See App., *infra*, 2a; J.S. App. 6a-7a. Appellants alleged that the State of Utah would have been apportioned an additional Representative in the House of Representatives if the

Census Bureau had either included LDS missionaries residing abroad, or excluded all federal personnel living outside the United States, in calculating the official state-level population totals. App., *infra*, 11a-12a. Appellants requested an injunction directing the Bureau either (1) to include overseas LDS missionaries in, or (2) to exclude all federal overseas employees from, the official apportionment count. *Id.* at 20a; see J.S. App. 7a. The State of North Carolina and several North Carolina officials intervened as defendants. J.S. App. 3a. Pursuant to 28 U.S.C. 2284(a), the case was referred to a three-judge panel of the United States District Court for the District of Utah. J.S. App. 3a.

5. The district court entered summary judgment in favor of the federal and North Carolina defendants (appellees in this Court). J.S. App. 1a-19a.

a. In considering appellants' claims under RFRA and the Free Exercise Clause, the district court explained that "both causes of action require a demonstration that the Census Bureau's decision as to which groups of overseas Americans to enumerate burdened [appellants'] exercise of religion." J.S. App. 10a. The court accepted appellants' assertion that "missionary work 'is one of the most basic and important obligations of the LDS faith.'" *Ibid.* The court concluded, however, that appellants had "present[ed] nothing more than conclusory and completely speculative allegations that their practice of religion or religious beliefs were burdened in any way by the Census Bureau's decision not to enumerate LDS missionaries who were abroad on Census Day 2000," and on that basis it rejected appellants' RFRA and free exercise claims. *Id.* at 10a-11a.

b. With respect to appellants' claims under the Census Clause and the Census Act, the district court

first considered and rejected appellants' claim that "if federal overseas employees are counted in the apportionment count, LDS missionaries must be as well because they are similarly situated to federal overseas employees." J.S. App. 12a; see *id.* at 12a-14a. The court rejected the contention that "LDS missionaries are similarly situated to overseas federal employees," explaining that "LDS missionaries, a tiny fraction of the entire overseas population of five million or so, are not so similarly situated for several reasons, including the very fact that such missionaries are so disproportionately distributed among the states." *Id.* at 13a n.7. The court noted in that regard that "of all LDS missionaries abroad on April 1, 2000 (24,251), a hugely disproportionate number of them (46%) were abroad from Utah." *Id.* at 12a. The court concluded:

> Given that the goal of apportionment is "to achieve a fair apportionment *for the entire country*," *United States Dep't of Comm. v. Montana*, 503 U.S. 442, 464 * * * (1992) (emphasis added), commanding the enumeration of one group from one state obviously fails to further the constitutional goal of "equal representation." Indeed, inclusion of one such group to the clear advantage of one state would seem to undermine another goal of the Apportionment Clause, which is distributive accuracy.

Id. at 12a-13a.

Because inclusion of LDS missionaries in the apportionment count would "clearly and dramatically distort[] distributive accuracy, to the benefit of one state," J.S. App. 13a n.7, the court anticipated that any order directing such persons to be included would precipitate "constitutional challenges * * * from other groups of Americans abroad for religious or other purposes, in-

cluding students studying abroad, employees of companies with overseas offices, retirees, and numerous other groups who are overseas for charitable, humanitarian, or any number of other reasons," *id.* at 13a.[1] The court found that any judicial directive to include within the state-level population figures all "American citizens temporarily abroad, with ties to a particular state and an apparent intention to return to that state," would be impracticable because it would essentially "require that the decennial census conducted in 2000 be retaken." *Id.* at 13a-14a. The court further explained:

> Were we to adopt plaintiffs' suggestion that the Census Bureau can use the records of private organizations like the LDS Church, we discern additional problems in identifying and applying criteria to evaluate the reliability of such records. Although the LDS Church asserts it keeps meticulous records about its overseas missionaries, in order to discharge its own independent obligation to conduct the census, the Census Bureau would nonetheless have to develop some way of verifying the reliability of the information contained in such records. If we compel the Census Bureau to proceed in that direction, it will encounter multiple problems attempting to verify the records of myriad private organizations, each with different records and record-keeping practices and capabilities, in addition to inconsistencies relating to the willingness of such organizations to identify themselves, cooperate, and

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[1] The court noted that the Director of the Census Bureau had "estimated in 1999 that there were five million" non-federal-employee Americans living overseas, J.S. App. 12a, but that "estimates varied from three million to ten million," *id.* at 12a n.6.

> not mount challenges among themselves, the various states, and the Census Bureau.

Id. at 14a n.8.

The district court concluded that the alternative remedy sought by appellants—exclusion of federal personnel stationed abroad from the 2000 census count—was precluded by this Court's decision in *Franklin*. J.S. App. 15a-19a. While acknowledging that the Court in *Franklin* "was not explicitly presented with another group of Americans abroad claiming to be similarly situated to federal employees and seeking on that basis to be enumerated," the district court observed that this Court "obviously knew that federal employees were not the only group of Americans abroad, and that, by enumerating them, the Census Bureau only enumerated a subset of Americans abroad." *Id.* at 16a. The court also found that "[t]he involuntariness of their overseas posting, at the behest of their government, differentiates most federal employees from most non-federal employees living overseas." *Id.* at 17a. The court noted as well that "[i]nclusion of federal employees [in the census], unlike the inclusion of various other groups of private American citizens abroad, does not invite the kind of manipulation by states or the injection of local or parochial bias which the founders wished to avoid." *Id.* at 18a.

Finally, the district court explained that

> federal employees overseas are uniquely susceptible to being accurately counted because the Census Bureau has access to data about those individuals which is different both in quality and quantity from the data available about other Americans overseas. It has access to records maintained in the ordinary course of business by the government with respect to

> the government's own employees. As the evidence presented in support of the summary judgment motions indicates, there is simply no other group which can be as readily identified and dependably counted as federal employees overseas.

J.S. App. 18a. The district court concluded that the inclusion of overseas federal employees in the apportionment count was "a rational exercise of the Secretary's discretion, delegated to the Census Bureau, to conduct its obligation to enumerate the population for apportionment purposes." *Id.* at 19a.

c. The district court did not address the claim that appellants initially had asserted under the Equal Protection Clause, explaining that appellants had abandoned that argument. J.S. App. 7a. In addition, based on this Court's decision in *Franklin*, the district court rejected appellants' claim under the APA. *Id.* at 8a. In *Franklin*, the Court held that the report of state-level population figures transmitted by the President to Congress pursuant to 2 U.S.C. 2a(a) is not reviewable "final agency action" within the meaning of the APA "[b]ecause it is the President's personal transmittal of the report to Congress that settles the apportionment," 505 U.S. at 798, 799, and the President is not an "agency" within the meaning of the APA, *id.* at 800-801.[2]

d. Judge Benson joined the opinion of the court with respect to appellants' APA, RFRA, and Free Exercise claims, but concurred only in the result with respect to appellants' claims under Article I, Section 2, Clause 3 and the Census Act. J.S. App. 19a-20a.

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[2] Appellants do not press their Equal Protection Clause and APA claims in this Court.

ARGUMENT

In *Franklin* v. *Massachusetts*, 505 U.S. 788, 806 (1992), this Court sustained the decision of the Secretary of Commerce to include overseas federal military and civilian personnel in the state-level apportionment counts as a judgment "consonant with, though not dictated by, the text and history of the Constitution." Notwithstanding that ruling, appellants contend that federal personnel stationed overseas as of the census date may not lawfully be included in the official population totals unless the Secretary also includes missionaries of the Church of Jesus Christ of Latter-day Saints (LDS) who were living abroad on the census date. Because appellants' claims are insubstantial, the appeal should be dismissed. Cf. *Department of Commerce* v. *United States House of Representatives*, 525 U.S. 316, 344 (1999). In the alternative, the judgment of the district court should be summarily affirmed.

I. APPELLANTS ARE NOT ENTITLED TO A JUDICIAL ORDER REQUIRING EITHER THE INCLUSION OF LDS MISSIONARIES, OR THE EXCLUSION OF FEDERAL PERSONNEL STATIONED ABROAD, IN THE CALCULATION OF STATE-LEVEL POPULATION FIGURES

In their second amended complaint, appellants requested that the district court "enter an injunction requiring [the Secretary] to apply the 'usual residence' rule to the temporarily absent LDS missionaries who were undercounted in the 2000 census or, in the alternative, enter an injunction requiring [the Secretary] to remove the other temporarily absent citizens from the apportionment count." App., *infra*, 20a. Appellants alleged that either the inclusion of LDS missionaries in

the state-level figures, or the exclusion of overseas federal personnel from the count, would have caused the State of Utah to receive an additional Representative in the House of Representatives. *Id.* at 11a-12a.

A. The district court held that because appellants' second amended complaint did not seek the inclusion in the apportionment count of any persons other than LDS missionaries, appellants had waived their right to request such broader relief. See J.S. App. 11a n.5. But even if appellants had properly preserved their claim to such a remedy, they would lack standing to seek it. In order to satisfy the requirements of Article III, "it must be 'likely,' as opposed to merely 'speculative,' that [the plaintiff's] injury will be 'redressed by a favorable decision.'" *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (quoting *Simon* v. *Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 43 (1976)). In this case, it is entirely speculative whether the inclusion in the official population totals of an as-yet unspecified class of "other identifiable Americans living abroad who have retained similar ties to their home States" (J.S. i) would cause Utah to be apportioned an additional Representative. Cf. *Franklin*, 505 U.S. at 802 (opinion of O'Connor, J.) (plaintiffs lacked standing to challenge the method by which federal personnel stationed overseas were allocated to particular States because they had "neither alleged nor shown * * * that Massachusetts would have had an additional Representative if the allocation had been done using some other source of 'more accurate' data").

Appellants' second amended complaint alleged that the State of Utah would receive an additional Representative if LDS missionaries were included in the state-level population totals or if overseas federal personnel were excluded. See App., *infra*, 11a-12a. The

complaint did not allege, however, that Utah would receive an additional Representative if a broader category of United States nationals temporarily residing abroad were included in the count. Appellants nevertheless contend that they "established through evidence submitted to the district court" that "Utah would have been entitled to a fourth Representative following the 2000 census if the Bureau had * * * conducted an enumeration of all Americans residing temporarily abroad." J.S. 6-7. The declarations that appellants submitted in the district court do not support that claim.

Appellants' declarants stated that Utah would be entitled to an additional Representative "*[i]f* the state-by-state distribution of the estimated 3-7 million Americans living abroad * * * mirrored that of the total resident population." Wolfson II Decl. para. 22 (emphasis added); accord Weber Decl. para. 25. Appellants failed, however, to produce any empirical evidence to support their premise that the population of United States nationals residing abroad is in fact so distributed. The Declaration of Lara J. Wolfson, Ph.D., simply stated: "I know of no reason to believe that the full overseas population is distributed any differently than the domestic population. The full overseas population is most likely distributed differently from the overseas federal employee population, and is distributed more like that of the total resident population." Wolfson II Decl. para. 25. The Declaration of Ronald E. Weber, Ph.D., similarly stated: "I know of no reason why the state-by-state distribution of *all* Americans living temporarily overseas would differ significantly from that of the total resident population." Weber Decl. para. 24. Such conclusory assertions that the State-by-State distribution of United States nationals abroad presumptively mirrors the distribution of the

domestic population—or, more precisely, statements that the declarants "know of no reason" why they do not mirror that distribution—are insufficient to carry appellants' burden of establishing an affirmative likelihood that Utah would receive an additional Representative if non-federal employees were added to the apportionment count.

Furthermore, as the government's declarant explained (and appellants' declarants did not refute), various factors could affect the number of residents of any one State who choose to live abroad, including the employment levels in each State, the availability of jobs both within the State and overseas, whether overseas jobs are offered to residents of a particular State by any company doing business there, and the portion of the State's population that speaks a foreign language. See Waite Decl. para. 56 (describing other reasonable assumptions). For that reason as well, there is no basis for concluding that the distribution among the States of all United States nationals abroad would mirror the distribution of the total domestic population. See Waite Decl. paras. 21, 43, 56, 57.

Finally, even if appellants' claim that a broader class of United States nationals living abroad should now be counted were otherwise judicially cognizable, the Secretary could not feasibly be directed at this late date to identify and attribute to particular States those additional United States nationals who resided abroad on April 1, 2000, and who maintained (as of that date) sufficient ties to this country to warrant inclusion in the count under appellants' current theory. As the district court recognized, a judicial order requiring inclusion of all such persons in the count would effectively "require that the decennial census conducted in 2000 be retaken." J.S. App. 14a. The court correctly held that

such a remedy "is a practical, if not an actual, impossibility." *Ibid.*

B. For the foregoing reasons, appellants are left with the claim that either LDS missionaries—alone among all non-federal employees living abroad on April 1, 2000 — should now be included in the State-by-State census counts, or all federal military and civilian personnel stationed overseas on that date must be excluded. Considerations of fairness and confidence in the integrity and political neutrality of the census weigh heavily against allocating one additional group to the States on a post hoc basis in these circumstances. Cf. *United States Dep't of Commerce* v. *Montana*, 503 U.S. 442, 465-466 (1992). That is especially true where, as here, that group is precisely tailored to shift one Representative to a particular State and there is no realistic opportunity to determine whether other groups may be similarly situated. Furthermore, substantial questions would be raised under the Establishment Clause if the Secretary were now to allocate to particular States LDS missionaries living abroad, but not missionaries of other faiths, or persons called to non-sectarian charitable or humanitarian work, or other United States nationals living and working abroad. See, *e.g.*, *County of Allegheny* v. *American Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 591 (1989) (under the Establishment Clause, "[n]either a state nor the Federal Government * * * can pass laws which aid one religion, aid all religions, or prefer one religion over another.") (quoting *Everson* v. *Board of Educ.*, 330 U.S. 1, 15 (1947)); *Larson* v. *Valente*, 456 U.S. 228, 244-246 (1982) (disparate treatment of different religious groups subject to the closest scrutiny).

Conversely, the "constitutional goal of equal representation," *Franklin*, 505 U.S. at 804, would be greatly

disserved by the alternative remedy appellants seek—the exclusion of all federal military and civilian personnel included in the count. This Court has already sustained the inclusion of overseas federal personnel and their dependents, who totaled 576,367 in the 2000 census. See App., *infra*, 10a. Those personnel vastly outnumbered the 24,251 LDS missionaries who appellants assert were residing abroad on April 1, 2000. See J.S. App. 12a. To exclude the former as a "remedy" for the exclusion of the latter would be wholly disproportionate.

In sum, neither the Census Clause, the Census Act, nor principles governing the award of equitable relief support appellants' request for judicial intervention at this late date.

II. THE SECRETARY'S DECISION TO INCLUDE IN THE APPORTIONMENT COUNT FEDERAL PERSONNEL STATIONED OVERSEAS, BUT NOT OTHER UNITED STATES NATIONALS LIVING ABROAD, DOES NOT VIOLATE THE CENSUS CLAUSE OR THE CENSUS ACT

The Census Clause vests Congress with broad discretion to conduct "[t]he actual Enumeration * * * in such Manner as they shall by Law direct." Article I, Section 2, Clause 3; see *Wisconsin* v. *City of New York*, 517 U.S. 1, 19 (1996) ("The text of the Constitution vests Congress with virtually unlimited discretion in conducting the decennial 'actual Enumeration,' and * * * there is no basis for thinking that Congress' discretion is more limited than the text of the Constitution provides.") (citation omitted). Congress has in turn conferred upon the Secretary of Commerce the authority to conduct the decennial census "in such form and content as he may determine." 13 U.S.C. 141(a); see

City of New York, 517 U.S. at 19 ("Through the Census Act, Congress has delegated its broad authority over the census to the Secretary."). Although the courts may review the Secretary's decisions regarding census methodology "to the extent of determining whether the Secretary's interpretation is consistent with the constitutional language and the constitutional goal of equal representation," *Franklin*, 505 U.S. at 804, substantial judicial deference is appropriate in light of "the wide discretion bestowed by the Constitution upon Congress, and by Congress upon the Secretary," *City of New York*, 517 U.S. at 23. "In light of the Constitution's broad grant of authority to Congress, the Secretary's decision[s] [regarding the conduct of the census] need bear only a reasonable relationship to the accomplishment of an actual enumeration of the population, keeping in mind the constitutional purpose of the census." *Id.* at 20.

Appellants do not contend that either the Constitution or the Census Act compelled the Secretary to include LDS missionaries in the apportionment count. Indeed, their complaint appears to assume (correctly) that the Secretary might legitimately have chosen to exclude from the state-level totals *all* United States nationals who resided abroad on the census date, as had been done in all censuses (with one limited exception in 1900, see *Franklin*, 505 U.S. at 792-793; pp. 3-4, *supra*) prior to 1970. See 505 U.S. at 806 (Secretary's decision to include federal personnel stationed overseas was "a judgment, consonant with, *though not dictated by*, the text and history of the Constitution") (emphasis added). Rather, the gravamen of their suit is that the Secretary could not lawfully differentiate in this context between federal personnel and other United States nationals who were temporarily resident abroad as of that date.

See, *e.g.*, J.S. 20 (asserting that "overseas federal employees constitute an arbitrary, non-representative segment of the total overseas population"). That claim lacks merit.

A. An individual's status as a member of the Armed Forces or federal civilian employee creates distinct connections to the United States, and to the individual's prior State of residence, that United States nationals living abroad for other reasons do not necessarily share. Overseas federal military and civilian personnel are by definition residing abroad in service of their country. An individual whose physical absence from the United States is the consequence of federal service may more readily be assumed to retain the "element of allegiance or enduring tie to" this country that has historically underlain the concept of "usual residence." See *Franklin*, 505 U.S. at 804. Because they are in the service of the United States, moreover, such persons may be subject to various federal statutory and regulatory requirements that are inapplicable to private citizens abroad. Those individuals also often live or work in areas—such as military bases and embassies—over which the United States government exercises plenary control. Neither the text nor the history of the pertinent constitutional and statutory provisions suggests that the Secretary is precluded from taking those differences into account in determining whether particular United States nationals temporarily resident abroad retain sufficient "ties to the States," *id.* at 806, to justify their inclusion in the apportionment count.

B. Not only does the Census Bureau have unique reasons to include federal military and civilian personnel stationed overseas in the apportionment count, it also has particularly accurate data regarding that category of United States nationals living abroad. The

Census Bureau "has access to data about [overseas federal military and civilian personnel] which is different both in quality and quantity from the data available about other Americans overseas." J.S. App. 18a. The Bureau "has access to records maintained in the ordinary course of business by the government with respect to the government's own employees." *Ibid.*

Even if there are other categories of United States nationals abroad who might reasonably be expected to retain ties to this country that are comparable in some measure to those of federal employees, the information necessary to identify such persons and allocate them to particular States will not typically be in the possession of the federal government. And the Bureau is likely to "encounter multiple problems attempting to verify the records of myriad private organizations, each with different records and record-keeping practices and capabilities, in addition to inconsistencies relating to the willingness of such organizations to identify themselves, cooperate, and not mount challenges among themselves, the various states, and the Census Bureau." J.S. App. 14a n.8. Reliance on private records would also require the Bureau to devise procedures to ensure that persons identified in such records had not previously been counted (*e.g.*, through inclusion on a census form submitted by a relative who resided in the United States on the census date). Cf. Waite Decl. para. 52. The district court therefore correctly concluded that "there is simply no other group which can be as readily identified and dependably counted as federal employees overseas." J.S. App. 18a.

Appellants contend (J.S. 19-20) that LDS missionaries are in this respect similarly situated to federal employees abroad because LDS missionaries can likewise be reliably identified and allocated to particular

States through the use of pre-existing records maintained by the Church itself. The Secretary could properly conclude, however, that the integrity of the census would be compromised if the task of enumerating subsets of the population were effectively delegated to private organizations.[3] The reasonableness of that determination does not depend on courtroom proof that a particular organization's records are in fact unreliable. Thus, "[a]lthough the LDS Church asserts it keeps meticulous records about its overseas missionaries, in order to discharge its own independent obligation to conduct the census, the Census Bureau would nonetheless have to develop some way of verifying the reliability of the information contained in such records." J.S. App. 14a n.8.

The Secretary could also reasonably determine that any such standards for utilizing private records of the sort on which appellants rely should be developed in advance of the census and be stated in terms that apply to the records of private organizations more generally. No comparable difficulties attend the inclusion in the apportionment count of United States government

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[3] The Constitution's express decision to entrust the "actual Enumeration" to Congress reflects the Framers' awareness that only the national government could dispassionately perform a function integral to the apportionment of Representatives among the States. As Edmund Randolph explained at the Constitutional Convention, "[t]he census must be taken under the direction of the General Legislature. The States will be too much interested to take an impartial one for themselves." 1 M. Farrand, *The Records of the Federal Convention of 1787*, at 580 (1966 ed.). Delegation of the federal government's census-taking responsibilities to a private organization would raise similar concerns. That is particularly so with respect to an entity, like the LDS Church, whose organizational structure and membership are disproportionately concentrated in a single State.

employees temporarily resident abroad on the census date, whose identities and prior States of residence can be easily ascertained through pre-existing *federal* records. See *id.* at 18a (noting that "[i]nclusion of federal employees, unlike the inclusion of various other groups of private American citizens abroad, does not invite the kind of manipulation by states or the injection of local or parochial bias which the founders wished to avoid").

C. Appellants also suggest (J.S. 17) that the Secretary's decision to include federal military and civilian personnel stationed overseas (but not LDS missionaries) in the apportionment count constituted a form of "sampling" prohibited by 13 U.S.C. 195. That claim is wholly without merit. The government did state in the district court that federal employees abroad, unlike LDS missionaries, are distributed among the States in proportions roughly comparable to the distribution of the domestic population. See J.S. 10 n.5, 16 n.8; see also J.S. App. 17a. The government did not and does not seek, however, to defend the inclusion of overseas federal employees in the apportionment count as a means of estimating the total population of United States nationals abroad. The Census Bureau's reasons for including those employees in the state-level population totals were presented to this Court in *Franklin*, and this Court sustained the Secretary's decision. The fact that federal personnel stationed overseas are in some sense representative of the total United States population is not by itself a sufficient ground for including them in the count, but neither is it a basis for excluding them.

D. Because the Court in *Franklin* "was not explicitly presented with another group of Americans abroad claiming to be similarly situated to federal employees and seeking on that basis to be enumerated," J.S. App.

16a, its decision does not squarely control the instant case. As the district court observed, however, this Court "obviously knew that federal employees were not the only group of Americans abroad, and that, by enumerating them, the Census Bureau only enumerated a subset of Americans abroad." *Ibid.* The *Franklin* Court's facially unqualified approval of the approach taken by the Bureau in the 1990 census surely suggests that the Court perceived no infirmity in the Bureau's decision to differentiate between federal employees and other United States nationals residing abroad.

III. THE CENSUS BUREAU'S DECISION NOT TO INCLUDE NON-FEDERAL EMPLOYEES RESIDING ABROAD IN THE APPORTIONMENT COUNT DOES NOT VIOLATE ANY APPELLANT'S RIGHTS UNDER THE FREE EXERCISE CLAUSE OR THE RFRA

The four appellants who were LDS missionaries living abroad on the census date also assert claims under the Free Exercise Clause and the RFRA. See J.S. App. 9a n.3 (noting appellants' concession that only the four missionary appellants have standing to bring free exercise and RFRA claims). Those appellants contend that the Census Bureau has imposed a substantial burden on their religious exercise, because as a consequence of their missionary service the State of Utah has been apportioned three rather than four Representatives. See J.S. 25. Those claims lack merit. Appellants' free exercise claim fails at the outset because the government policy that they challenge does not target religious practice or belief, but is instead a neutral rule applicable to *all* non-federal employees who resided abroad on the 2000 census date. In any

event, that policy imposes no substantial burden on any appellant's exercise of religion, since the effect of a missionary's decision to reside abroad is simply that his prior State of residence is credited with one fewer inhabitant.

A. Appellants contend that the challenged Census Bureau policy has the practical effect of discouraging missionary service because "the Bureau's discriminatory policy clearly denies a benefit (an additional congressional seat) because of conduct mandated by religious belief (missionary service)." J.S. 25 (internal quotation marks omitted). This Court's precedents make clear, however, that a neutral law of general applicability does not violate the Free Exercise Clause even if its practical effect is to disadvantage persons who have engaged (or who would otherwise wish to engage) in religiously motivated conduct. In *Employment Division* v. *Smith*, 494 U.S. 872 (1990), for example, the Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Id.* at 879 (internal quotation marks omitted); see *id.* at 886 n.3 ("religion-neutral laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest"). Subsequent decisions of this Court have reaffirmed that neutral laws do not violate the Free Exercise Clause because of their impact on religious practices. See *City of Boerne* v. *Flores*, 521 U.S. 507, 514 (1997) ("*Smith* held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest."); *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S.

520, 531 (1993) ("a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice"); J.S. App. 9a.

Appellants do not contend that the Census Bureau has excluded LDS missionaries from the apportionment count *because* their absence from this country on the census date was religiously motivated. Cf. *Church of the Lukumi*, 508 U.S. at 533 ("if the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral, and it is invalid unless it is justified by a compelling interest and is narrowly tailored to advance that interest") (citation omitted). Rather, exclusion of the LDS missionaries was simply one aspect of a neutral, generally applicable policy covering all non-federal employees residing abroad as of the census date. Indeed, far from complaining that the government has singled them out for disfavored treatment because of their religion, appellants effectively seek favorable treatment because their absence from the country was religiously motivated. Appellants therefore could not prevail on their free exercise claim even if they could establish that their exclusion from the apportionment count substantially burdened their exercise of religion.

B. 1. The RFRA provides that "[g]overnment shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," 42 U.S.C. 2000bb-1(a), unless the challenged government practice is the least restrictive means of furthering a compelling government interest, 42 U.S.C.

2000bb-1(b).[4] Contrary to appellants' contention (J.S. 24-28), however, the exclusion of LDS missionaries from the apportionment count does not "substantially burden" their exercise of religion. An individual derives no concrete benefit from inclusion in the census, and he suffers no concrete injury from being left uncounted. Indeed, the Census Clause and the Census Act do not appear to confer any legally cognizable personal rights at all on individual members of the population to be included in the census count. Rather, the interests protected by the Census Clause and the Census Act are those of the States and the general populations of the respective States.

Accordingly, insofar as the challenged Census Bureau policy is concerned, the only disadvantage that an LDS missionary suffers as a result of his decision to reside abroad on the census date is that the President credits his State with one fewer inhabitant. That governmental action in arriving at a State's total population has at most a *de minimis* effect on a particular missionary's religious exercise; it surely does not impose a "substantial[] burden" of the sort to which RFRA is directed. Compare *Lyng* v. *Northwest Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988). Indeed, the burden appellants claim—the loss of "an additional congressional seat"—is visited upon the State, not appellants. Any disadvantage that a missionary suffers as a result of the reduction in the number of inhabitants attributed to his prior State of residence is not imposed

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[4] Although this Court has held the RFRA to be unconstitutional as applied to the States, see *City of Boerne*, *supra*, the statute may validly be applied to the activities of the federal government. See J.S. App. 9a n.4.

on the missionary alone, but is shared equally by all other persons within the relevant State.[5]

Thus, despite appellants' concession (see J.S. App. 9a n.3) that only the four LDS missionary plaintiffs (rather than the State of Utah and/or its officials) have standing to pursue a RFRA claim, appellants have failed to show that any individual missionary would suffer a meaningful disadvantage as a result of *his own* religious exercise. Rather, the thrust of appellants' claim is that the challenged Census Bureau policy has a disparate impact on the State of Utah, and on its inhabitants generally, because Utah has a larger-than-average number of residents whose religious convictions led them to reside abroad on the census date. Appellants identify no precedent suggesting that any such disparate impact on a larger group, of which LDS missionaries comprise only a small subset (see note 5, *supra*), can form the basis of a valid RFRA claim.

Finally, any burden on religious exercise that may be imposed by the Census Bureau's decision not to include LDS missionaries abroad within the apportionment count is independent of the Bureau's decision that overseas federal military and civilian personnel stationed abroad *should* be counted. If the Bureau had adopted a categorical rule that no United States nationals residing abroad on the census date would be included in

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[5] Appellants' second amended complaint alleged that "[a]ccording to the census, the total resident population of Utah in 2000 was 2,236,714." App., *infra*, 10a. The complaint further alleged that "eleven thousand one hundred and seventy-six of the LDS missionaries stationed outside of the United States were from Utah." *Id.* at 11a. Thus, on appellants' own theory, fewer than one half of one percent of the persons who are disadvantaged by the allocation to Utah of three rather than four Representatives were LDS missionaries residing abroad on the census date.

the state-level population totals, an individual's decision to serve as an LDS missionary would have the same consequence that it has under the Bureau's actual policy: namely, that the individual's State would be credited with one fewer inhabitant than would otherwise be the case. Appellants do not contend, however, that such a policy would violate any missionary's rights under the RFRA.

2. Contrary to appellants' suggestion (J.S. 24-25, 27-28), the district court did not suggest that a plaintiff must actually forgo religious exercise in order to assert a valid RFRA claim. Rather, the court relied (see J.S. App. 10a) on appellants' complete failure to present evidence that the challenged Bureau policy "in any way burdened, or even tended to burden or coerce, [any appellant's] free exercise of his religious belief in the performance of missionary work."

As the district court observed, "[o]nly one of the four LDS missionary plaintiffs has filed an affidavit in support of [appellants'] motion for summary judgment." J.S. App. 10a. The Declaration of Michael Wayne Anderson stated: "I sincerely believe that performing missionary work—which involves both proselytizing and community service—is one of my most important obligations as a member of the LDS Church." Anderson Decl. para. 4. Mr. Anderson also declared: "My call to serve specified both the time period during which I would serve and the geographic area in which I would labor. I believe that both aspects of the call were divinely inspired." *Id.* at para. 8.

That declaration established that Mr. Anderson's absence from this country was motivated by his religious convictions. The declaration contained no reference to the 2000 census, however, let alone any explanation of how Mr. Anderson's religious exercise

was burdened by the Census Bureau's decision not to include non-federal employees residing abroad in the apportionment count. In light of appellants' complete failure to produce evidence of a substantial burden on religious exercise—as well as the fact that the failure to include any one individual in the census count of a State affects all inhabitants of the State equally and does not distinctly injure the individual concerned (see pp. 26-28, *supra*)—the district court correctly found that appellants had "present[ed] nothing more than conclusory and completely speculative allegations that their practice of religion or religious beliefs were burdened in any way by the Census Bureau's decision not to enumerate LDS missionaries who were abroad on Census Day 2000." J.S. App. 10a-11a.

CONCLUSION

The appeal should be dismissed. In the alternative, the judgment of the district court should be summarily affirmed.

Respectfully submitted.

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OCTOBER 2001

APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION

Case No. F-2-01-CV-23:B

STATE OF UTAH, MICHAEL O. LEAVITT, GOVERNOR, OLENE S. WALKER, LIEUTENANT GOVERNOR, MARK L. SHURTLEFF, UTAH ATTORNEY GENERAL, L. ALMA MANSELL,PRESIDENT OF THE UTAH SENATE, MARTIN R. STEPHENS, SPEAKER OF THE UTAH HOUSE, MIKE DMITRICH, UTAH SENATE MINORITY LEADER, RALPH BECKER, UTAH HOUSE MINORITY LEADER, ORRIN G. HATCH, UNITED STATES SENATOR, ROBERT F. BENNETT, UNITED STATES SENATOR, JAMES V. HANSEN, MEMBER OF CONGRESS, CHRISTOPHER B. CANNON, MEMBER OF CONGRESS, JAMES MATHESON, MEMBER OF CONGRESS, BLAKE J. RUSSON, MICHAEL WAYNE ANDERSEN, BRENT & JEAN MCGHIE, PLAINTIFFS

v.

DONALD L. EVANS, SECRETARY OF COMMERCE; WILLIAM G. BARRON, ACTING DIRECTOR, UNITED STATES CENSUS BUREAU, DEFENDANTS

Filed: January 30, 2001

PLAINTIFFS' SECOND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

THREE-JUDGE PANEL REQUESTED PURSUANT TO 28 U.S.C. § 2284

Plaintiffs, the State of Utah ("Utah" or the "State"), and various citizens and representatives of Utah, hereby submit this Complaint and allege as follows in support of their claims for relief:

NATURE OF THE CASE

This is an action for declaratory and injunctive relief arising under the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202; the All Writs Act, 28 U.S.C. § 1651; the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* ("the APA"); the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. § 2000bb *et seq*; Section 2a of Title 2; the Census Act, 13 U.S.C. § 1 *et seq*; Section 2, Clause 3 of the United States Constitution; the First Amendment; Section 2 of the Fourteenth Amendment; and the Equal Protection Clause of the Fifth Amendment, against Donald L. Evans,[1] in his official capacity as the Secretary of Commerce and William G. Barron, in his official capacity as the Acting Director of the United States Census Bureau (collectively, "Defendants"). The present action challenges the Defendants' failure, in the most recent census, to count missionaries of the Church of Jesus Christ of Latter-day Saints ("the LDS Church") who are temporarily serving abroad on the same terms as federal employees temporarily serving abroad. The Defendants' failure to treat these two groups of American citizens equally has thus far

[1] The Senate approved the nomination of Donald L. Evans to be Secretary of the Department of Commerce on January 20, 2001. With the ongoing change of the federal administration, William G. Barron has assumed the post of Acting Director of the Census Bureau. Pursuant to Fed. R. Civ. P. 25(d), Secretary Evans and Mr. Barron have been automatically substituted for the predecessors in their respective offices.

resulted in Utah's being deprived of an additional member of Congress to which the State is entitled.

1. This Complaint stems from the actions of the Defendants, who are the executive and legislative officers charged with conducting the 2000 census. As such, the Defendants are constitutionally charged with performing an "actual Enumeration" of the people of the United States every ten years. *See* U.S. Const. Art. 1, § 2, cl. 3.

2. As census officials, one of the most important functions that the Defendants perform is to determine the current "apportionment population." The apportionment population is the "total resident population (citizens and non-citizens) of the 50 states." *See* U.S. Census Bureau, *http://www.census.gov/population/www/censusdata/apportionment/faq.html.* It is on the basis of this count that seats in the United States House of Representatives are reapportioned among the fifty states.

3. This Complaint seeks an order directing the Defendants to apply a uniform and consistent standard in counting certain citizens who were temporarily absent from their usual residence during the tabulation of the apportionment population. Specifically, this Complaint seeks an order directing the Defendants to include within the final apportionment calculation those missionaries of the LDS Church who, like other Utahns and Americans serving abroad in the military or other federal service, were temporarily absent from their usual residence at the time of the census. Alternatively, the Complaint seeks an injunction requiring Defendants to remove the other temporarily abroad citizens from the apportionment count.

4. The Defendants' failure to include the temporarily abroad LDS missionaries in the 2000 apportionment calculation was a result of the Census Bureau's application of different standards to similarly situated individuals. As a first step in determining the apportionment population, the Census Bureau divided the total national population into two groups. The composition of the first and larger of these apportionment groups was determined by application of a uniform standard: the group consisted of all persons who were residing in the United States at the time of the census. *See* U.S. Census Bureau, *http://www.census.gov/ population/ www/censusdata/apportionment/ faq.html.*

5. The Census Bureau also used a uniform standard in allocating the members of the first apportionment group among the several states. Each resident was allocated according to his or her "usual residence," which the Census Bureau defined as "the place where [a person] live[s] and sleep[s] most of the time (most of the week, month, or year)." U.S. Census Bureau, *http://www.census.gov/population/www/censusdata/apportionment/faq.html.*

6. The Census Bureau's second apportionment group consisted of United States citizens who were living outside of the United States and thus were temporarily absent from their usual place of residence. Not all of the overseas United States citizens who were temporarily absent from their usual place of residence were included within the group, however. The Census Bureau excluded any United States citizen temporarily living abroad unless the person was a federal employee or a dependent of a federal employee living abroad.

7. Under the Census Bureau's disparate system for counting citizens temporarily living overseas, the select few United States citizens temporarily living abroad who were *also* federal employees or dependents were allocated back to their home state for purposes of the apportionment population. However, similarly situated LDS missionaries, who were also temporarily living abroad for predetermined period but who were not federal employees or dependents, were excluded for purposes of any apportionment population. In this respect, the Census Bureau discriminated against LDS missionaries temporarily living abroad based on the identity of the entity that sent them abroad (and therefore based on the secular or religious reason that they went abroad)—thereby depriving many temporarily absent citizens and their home states of the benefit of their presence in the apportionment count.

8. Plaintiffs therefore respectfully seek a declaration from this Court that the Census Bureau's disparate treatment of similarly-situated citizens is unconstitutional under the Apportionment Clause, the Fourteenth Amendment, the First Amendment and the Equal Protection Clause of the Fifth Amendment, is arbitrary and capricious under the APA, and violates the provisions of 2 U.S.C. § 2a, RFRA, and the Census Act.

THE PARTIES

9. The State of Utah ("Utah") entered the Union on January 4, 1896 as the 45th state.

10. Michael O. Leavitt is the Governor of Utah.

11. Olene S. Walker is the Lieutenant Governor of Utah.

12. Mark L. Shurtleff is the Attorney General of Utah.

13. L. Alma Mansell is the President of the Utah State Senate.

14. Martin R. Stephens is the Speaker of the Utah State House of Representative.

15. Mike Dmitrich is the Utah State Senate Minority Leader.

16. Ralph Becker is the Utah State House Minority Leader.

17. Orrin G. Hatch is the senior United States Senator from the State of Utah.

18. Robert F. Bennett is the junior United States Senator from the State of Utah.

19. James V. Hansen, is a Representative from the First Congressional District of Utah.

20. James Matheson is a Representative from the Second Congressional District of Utah.

21. Christopher B. Cannon is a Representative from the Third Congressional District of Utah.

22. Blake J. Russon is a citizen of the State of Utah, who at the time of the 2000 census was serving as an LDS missionary outside of the United States, and due to the disparate treatment alleged in this lawsuit was not counted in the census. He has recently resumed his residence in the State of Utah.

23. Michael Wayne Anderson is a citizen of the State of Utah, who at the time of the 2000 census was serving as an LDS missionary outside of the United States, and due to the disparate treatment alleged in this lawsuit was not counted in the census. He has recently resumed his residence in the State of Utah.

24. Brent & Jean McGhie are citizens of the State of Utah who are currently serving as LDS missionaries in the Republic of Georgia and who were outside of the United States at the time of the 2000 census. Due to the disparate treatment alleged in this lawsuit the McGhies were not counted in the census. They intend to resume their residence in the State of Utah at the end of their mission to Georgia.

25. Donald L. Evans is the Secretary of the United States Department of Commerce.

26. William G. Barron is the Acting Director of the United States Census Bureau.

JURISDICTION AND VENUE

27. Jurisdiction in this Court is proper under 28 U.S.C. § 2284. Pursuant to that section, Plaintiffs request that a three-judge district court be convened.

28. Venue is proper in this Court under 28 U.S.C. § 1391(e)(2) & (3).

GENERAL ALLEGATIONS

29. Both Article I, Section 2, Clause 3 of the United States Constitution and the Fourteenth Amendment to that document direct that every ten years the Executive Branch must count the number of persons in each

State, "in such manner as [Congress] shall by law direct." On the basis of the census, each state is allotted a number of Representatives in Congress proportional to its population.

30. Pursuant to its constitutional authority to determine how the "actual Enumeration" of the population should be conducted, Congress enacted the Census Act, 13 U.S.C. § 1 *et seq.* (the "Act"). The Act provides that the Secretary of Commerce "shall, in the year 1980 and every 10 years thereafter, take a decennial census of population as of the first day of April of such year." 13 U.S.C. § 141(a). Furthermore, "[t]he tabulation of total population by States . . . as required for the apportionment of Representatives in Congress among the several States shall be completed within 9 months after the census date and reported by the Secretary to the President of the United States." *Id.* § 141(b). The President must then "transmit to the Congress a statement showing the whole number of persons in each State . . . and the number of Representatives to which each State would be entitled." 2 U.S.C. § 2a(a). Within 15 days, the Clerk of the House of Representatives must "send to the executive of each State a certificate of the number of Representatives to which each State is entitled." *Id.* § 2a(b).

31. Since the first census in 1790, the U.S. Census Bureau, pursuant to authority delegated to it by the Secretary of Commerce, 13 U.S.C. §§ 2, 4, has allocated persons to their home states according to their "usual residence." The first enumeration Act interpreted "usual residence" broadly, such that "every person occasionally absent at the time of the enumeration [shall be counted] as belonging to that place in which he

usually resides in the United States." Act of Mar. 1, 1790, § 5, 1 Stat. 103. The concept took on broad meaning in the related context of congressional residence qualifications, U.S. Const. Art. I, § 2, as the Framers interpreted "inhabitants" to include "persons absent occasionally for a considerable time on public or private business." 2 Farrand, Records of the Federal Convention of 1787, at 217 (Madison).

32. Despite the Framers' broad interpretation of "usual residence," the Census Bureau has utilized a varying and occasionally narrow approach in allocating Americans temporarily living abroad to their home states. For example, the Bureau's apportionment figures included LDS missionaries serving in foreign countries in the 1910, 1920, 1930 and 1940 census, but have excluded them thereafter. *See* Karen M. Mills, *Americans Overseas in U.S. Census*, at 1, Bureau of Census, U.S. Dep't of Commerce, Technical Paper 62 (1993). With the exception of the 1900 census, the Bureau only began to count overseas military personnel in 1970, allocating them to their "home of record," namely the state to which they declared they would return at the end of their service. In 1980, finding that some overseas personnel were choosing their "home of record" on the basis of tax considerations, the Bureau ceased allocating overseas federal employees to particular states. However, the federal employees still considered themselves to be "usual residents" of the United States, and for that reason, among others, the Bureau again reversed its policy in 1990 and allocated federal employees living overseas according to their "home of record."

33. On April 1, 2000, the Census Bureau conducted the 2000 census. In its count of Americans living overseas, the Census Bureau once again included, with modest exception, U.S. military and federal civilian employees (and their dependents), allocating them to their home states based on data provided by the federal agencies that employed them, where available. Beyond federal employees (and their dependents), the Bureau did not include any Americans temporarily working, studying or living overseas.

34. On December 28, 2000, the Census Bureau released the first results of the Census, according to which the resident population was 281,421,906, a 13.2% increase from the 1990 census. 576,367 temporarily absent federal employees were also enumerated and allocated among the states.

35. According to the census, the total resident population of Utah in 2000 was 2,236,714. On this basis, Utah was apportioned three congressional seats.

36. Not included within the Utah, or the total national, population were those Americans temporarily living abroad, but who were not federal employees or dependents, such as the thousands of Utah citizens who were serving abroad as LDS missionaries at the time of the census.

37. Members of the LDS Church traditionally serve as missionaries for a discrete period of time—young men usually for 2 years, young women for 18 months, and older couples for one to three years. Their stations outside of the United States are temporary: the missionaries do not live more than four to six months in

any one location, and virtually all return home at the end of their service.

38. Many members of the LDS Church, and a correspondingly large proportion of LDS missionaries who serve outside of the Untied States, reside in Utah and return there after completing their service. While temporarily absent from Utah these missionaries continue to regard Utah as their home of residence. In fact, many of these missionaries continue to vote in the state by absentee ballot.

39. The LDS Church maintains records of the identity, temporary location and usual residence of these missionaries, similar to the data federal agencies provide the Census Bureau regarding their employees outside the United States. In 2000, eleven thousand one hundred and seventy-six of the LDS missionaries stationed outside of the United States were from Utah.

40. Had the Census Bureau properly enumerated these 11,176 Utah citizens, Utah would have been apportioned one additional seat in the House of Representatives as a result of the 2000 census. In fact, Utah would have received one additional Representative if the census had counted even 900 of the 11,176 Utah citizens that were excluded. Under the current, incomplete census 2000 count, that additional seat is slated to go to North Carolina, which was awarded 13 congressional seats on the basis of its population of 8,067,673.

41. Alternatively, Utah would also have been apportioned one additional seat in the House of Representatives if the Census Bureau had uniformly excluded all temporarily absent, overseas citizens from

its apportionment count. Based on the Bureau's count of all persons residing in the United States, Utah was slated to receive an additional Representative. Only when the Bureau added temporarily overseas federal employees to the census, while excluding similarly situated LDS missionaries, did the additional House seat transfer from Utah to North Carolina.

42. This loss of equal congressional representation is not the only injury traceable to Defendants' actions. Defendants' unequal treatment of temporarily overseas U.S. citizens will also deprive Utah of a full voice in at least two presidential elections. "The number of electoral votes allotted to each State corresponds to the number of Representatives and Senators that each States sends to Congress." National Archives and Records Administration, htt://www.nara.gov/fedreg/elctcoll/faq.html#number. Accordingly, by excluding from the census LDS missionaries who were temporarily living abroad while including federal employees and dependents in the same situation, Defendants have deprived Utah of a member of the Electoral College and thereby undermined the state's equal representation in the selection of our presidents.

43. Unless reversed, Defendants' discriminatory undercount of Utah's citizens will also deprive Utah and its citizens of their fair and intended share of federal funding and will skew the allocation of revenues within the state. A number of federal programs allocate the nation's resources to the several states and their citizens according to population. Relying on the accuracy and completeness of the census, the federal government looks to the census to determine the states' respective populations. Accordingly, by excluding more

than eleven thousand temporarily absent Utahns from the census, Defendants have deprived Utah and its citizens of the resources they are intended and entitled to receive.

CLAIMS FOR RELIEF

Count I
(U.S. Constitution Article I, Section 2, Clause 3, U.S. Constitution, Amend. XIV, Sec. 2)

44. Plaintiffs reallege paragraphs 1-43 as if set forth fully herein.

45. The Constitution requires that Defendants conduct an "actual Enumeration" of the "whole number of persons in each State." U.S. Const. Art. I, Sec. 2, Cl. 3; U.S. Const. Amend. XIV, § 2. This procedure is necessary so that Members of the U.S. House of Representatives may be "apportioned among the several States . . . according to their respective Numbers." U.S. Const. Art. I, § 2, Cl. 3; *see also* U.S. Const. Amend. XIV, § 2.

46. Defendants' refusal to include within the decennial census numerous Utah citizens who were temporarily absent from their ususal place of residence (while counting other temporarily absent residents) violates these constitutional mandates.

Count II
(The First Amendment)

47. Plaintiffs reallege paragraphs 1-46 as if set forth fully herein.

48. The Free Exercise Clause of the First Amendment provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. U.S. Const. Amend. I.

49. Defendants' actions violate the Free Exercise Clause because they burden a hybrid of the free exercise due process, equal protection, and apportionment rights of temporarily absent Utah citizens.

50. Alternatively, Defendants' actions violate the Free Exercise Clause because they provide secular but not religious exceptions from the rule that temporarily absent American citizens will not be enumerated and allocated in the census. Because of this discriminatory system of categorical exceptions, Defendants' conduct is not neutral and generally applicable.

51. Even if Defendants' discriminatory system of categorical exceptions is viewed as being neutral and generally applicable, it violates the First Amendment because it makes a value judgment that certain secular reasons for temporarily living abroad are more important than certain religious reasons for temporarily living abroad.

52. Because Defendants' conduct burdens a hybrid of constitutional rights, is not neutral and generally applicable, and categorically grants secular but not religious exceptions, it may be sustained only on a showing that the denial of a religious exception for temporarily absent LDS missionaries serves a compelling governmental interest and is the least restrictive means of furthering that interest. Defendants' conduct cannot be justified under that standard.

Count III
(Equal Protection—Disparate Treatment of Similarly Situated Voters and Citizens)

53. Plaintiffs reallege paragraphs 1-52 as if set forth fully herein.

54. "Undeniably the Constitution of the United States protects the right of all qualified citizens to vote." *Reynolds v. Sims*, 377 U.S. 533, 554 (1964). The right to vote is a fundamental constitutional guarantee essential to the success of our democratic from of government.

55. The Equal Protection Clause protects the exercise of this fundamental right. In particular, the principle of equal protection prohibits the government from "discriminat[ing] between categories of qualified voters in a way that . . . is wholly arbitrary." *O'Brien v. Skinner*, 414 U.S. 524, 530 (1974).

56. The Equal Protection Clause also requires that government treat similarly situated citizens similarly outside of the voting context unless the government can show a rational reason for discriminating against a particular group.

57. Defendants' decision to exclude from the decennial census thousands of Utah citizens who, at the time of the 2000 census, were stationed abroad as missionaries while at the same time including in its count Americans who were working abroad for U.S. government arbitrarily discriminates among similarly-situated classes of citizens and voters and thereby violates the constitutional guarantee of equal protection.

Count IV
(The Administrative Procedure Act)

58. Plaintiffs reallege paragraphs 1-57 as if set forth fully herein.

59. The right to be free from arbitrary and capricious government action is protected not only by the Constitution, but also by the Administrative Procedure Act. *See* 5 U.S.C. §§ 701-706. Likewise, the APA protects against final agency actions which infringe on the constitutional rights of equal protection and equal representation. *See* 5 U.S.C. § 706.

60. Defendants' actions in including temporarily absent overseas federal workers in the decennial census while excluding temporarily absent overseas LDS missionaries are arbitrary and capricious and infringe on the rights of equal protection and equal representation.

61. Defendants' repeated change in policy regarding the counting of U.S. citizens temporarily living abroad at the time of a census also violates the APA because Defendants have failed to provide a rational explanation or basis for their frequent and contradictory policy shifts.

62. These actions deprive Utah of political representation and federal funding to which the state and its citizens are entitled. Defendants actions' must therefore be reversed under 5 U.S.C. §§ 701-706.

Count V
(2 U.S.C. § 2a)

63. Plaintiffs reallege paragraphs 1-62 as if set forth fully herein.

64. In implementing the Constitution's command for an actual enumeration of each state's population, 2 U.S.C. § 2a(a) requires the President to "transmit to the Congress a statement showing the *whole number* of persons in each State, . . . as ascertained under the . . . decennial census *of the population*, and the number of Representatives to which each State would be entitled." 2 U.S.C. § 2a(a) (emphasis added).

65. Defendants' exclusion of temporarily absent LDS missionaries from the census contravenes Congress' plainly expressed intent that the census should include, as far as practicable, a complete accounting of the population and a resulting equal apportionment of Representatives.

Count VI
(The Census Act)

66. Plaintiffs reallege paragraphs 1-65 as if set forth fully herein.

67. The Census Act, as amended, requires Defendants to create a "tabulation of *total population* by States." 13 U.S.C. § 141 (emphasis added). In this and other expressions, the Census Act makes clear that Defendants are required to conduct an actual count of the total population of the United States. *See e.g.*, Pub. L. 105-119, Title II, §§ 209, 210(a)- (j), 111 Stat. 2480.

68. Properly interpreted, the Census Act requires Defendants to enumerate and allocate the readily identifiable LDS missionaries who are temporarily absent from their usual residences. Defendants' failure to do so violates Congress' intent, as expressed in the Census Act.

69. Alternatively, if the Census Act can be interpreted in a manner that does not require Defendants to enumerate and allocate the LDS missionaries who are temporarily living abroad, the Act must also be interpreted to exclude other similarly situated members of the population, such as federal employees and dependents.

Count VII
(The Religious Freedom Restoration Act)

70. Plaintiffs reallege paragraphs 1-69 as if set forth fully herein.

71. RFRA provides, in relevant part, that "Government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability" unless the government demonstrates that application of the law in question "(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000bb-1.

72. It is a central tenet of the LDS faith that members of the LDS church should travel abroad to engage in religious proselytizing and community service. Members of the LDS church have been called to

serve as missionaries outside of the U.S. since the earliest days of the church.

73. Defendants' disparate treatment of U.S. citizens temporarily living abroad substantially burdens the free exercise of the LDS faith. Defendants' actions in excluding from the census LDS missionaries serving abroad frustrates, rather than furthers, the compelling governmental interests associated with the census. Defendants' actions are not the least restrictive means for furthering any compelling governmental interests.

74. Accordingly, Defendants' actions in excluding temporarily absent LDS missionaries from the census, while including similarly situated federal employees, violate the provisions of RFRA.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs, by their undersigned counsel, request that the Court grant the following relief:

(a) enter a declaratory judgment, pursuant to 28 U.S.C. §§ 2201 and 2202, declaring that the Census Bureau's disparate treatment of similarly-situated citizens violates the provisions of the APA, RFRA, Section 2a of Title 2, and the Census Act;

(b) enter a declaratory judgment, pursuant to 28 U.S.C. §§ 2201 and 2202, declaring that the Census Bureau's disparate treatment of similarly-situated citizens violates Section 2, Clause 3 of the United States Constitution, the First Amendment, Section 2 of the

Fourteenth Amendment, and the Equal Protection Clause of the Fifth Amendment;

(c) enter an injunction requiring Defendants to apply the "usual residence" rule to the temporarily absent LDS missionaries who were undercounted in the 2000 census or, in the alternative, enter an injunction requiring Defendants to remove the other temporarily absent citizens from the apportionment count; and

(d) grant such further relief as this Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing document was served by facsimile or hand delivery on January 30, 2001 on each of the persons listed below:

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